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In the

Supreme Court of the United States

October Term, 1954

THE STATE OF WISCONSIN and
THE PUBLIC SERVICE
COMMISSION OF WISCONSIN,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Attorney General of Wisconsin on behalf of the State of Wisconsin and the Public Service Commission of Wisconsin prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled case on July 2, 1954.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 214 Fed. 2d 334.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1954. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

QUESTION INVOLVED

The ultimate issue herein is the delineation of the line, if any yet exists, between those rivers which are navigable waters of the United States and hence under federal control, and those little rivers and streams whose destiny lies within the control of the several states.

This issue is admirably raised by the present case because the river involved over which the Federal Power Commission has asserted jurisdiction is much smaller than any river which this court has ever held to be a navigable water of the United States, and is practically unknown even to many residents of the state of Wisconsin.

More specifically, the issue is:

(1) Does the use of the East Fork of the Chippewa River for the driving of loose logs during short periods of high water in the spring make that river a navigable water of the United States?

(2) Allied to the principal issue is the question of whether the Court of Appeals has correctly applied the rule of administrative review that findings must be supported by substantial evidence in view of the entire record.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (41 Stats. § 1063 as amended by the Public Utility Act of 1935, 49 Stats. § 838, 16 U. S. C. § 791 (a) et seq.) are as follows:

16 U. S. C. A.: "§ 796. Words used in chapter defined

"The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

"* * *

"(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;"

16 U. S. C. A.: "797. General powers of commission

"The commission is hereby authorized and empowered—

"* * *

"(e) *To issue licenses* to citizens of the United States, or to any association of such citizens, or *to any corporation* organized under the laws of the United States or any State thereof, or to any State or municipality *for the purpose of constructing, operating, and maintaining dams,* water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power *across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories),* or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *"

STATEMENT OF FACTS

The Winter Electric Light and Power Company of Wisconsin, licensee herein but not a party to the court action, applied to the Federal Power Commission for a license to construct a small 400 Kilowatt power dam on the East Fork of the Chippewa River in Sawyer county, Wisconsin. An initial license was granted based upon the power to license plants occupying lands of the United States.

The Supreme Court of Wisconsin held on May 6, 1952 that this license was not exclusive and that a license under state law was also necessary. Thereupon the applicant moved to secure an amendment of its license to include a finding that the project was located on a navigable water of the United States. By its decision issued April 21, 1953

the Federal Power Commission amended the license and entered its order finding that the East Fork of the Chippewa River at the point in question was a navigable water of the United States.

Petitioners herein filed a petition for review of this order before the United States Court of Appeals for the Seventh Circuit, and as a result thereof on July 2, 1954 that court entered its judgment affirming the order of April 21, 1952 of the Federal Power Commission.

Nature of the River. The East Fork of the Chippewa River originates in southeastern Ashland county, Wisconsin, runs in a southwesterly direction through Ashland and Sawyer counties, Wisconsin, to its confluence with the West Fork of the Chippewa River, and then continues south and southwesterly through Sawyer, Rusk, Chippewa, Eau Claire and Pepin counties, and empties into the Mississippi River at the south end of Lake Pepin on the Wisconsin-Minnesota boundary.

The flow of the river varies from a high of in excess of 500 cu. ft. per second available ten percent of the time to a possible low of 30 cu. ft. per second.

Log drives originating in the headwaters of the East Fork of the Chippewa River took place regularly over a period of 40 years, commencing as far back as 1876 and continuing up until 1924. These drives went down the river past the site of the project at Snaptail Rapids to points downstream therefrom and many of the logs in such drives were driven to points outside of the state of Wisconsin.

Specialized boats were used in connection with these log drives known as batteaux and wannigans. The bateaux

were personnel carriers about 30 feet long and 4½ to 5 feet wide with a 10-inch draft which could carry 18 men. The wannigans were large flat boats 30 to 35 feet long, formed with huge logs sloped up at the ends with one oar in front and one behind for guiding purposes. These wannigans were used for a portable kitchen and for carrying luggage. The cargo was generally portaged around Snaptail Rapids and the boats were propelled through the rapids by means of ropes and anchors.

The logs driven down the river were 3 feet and more in diameter and consisted of the high floating cork pines.

The Court of Appeals stated the following concerning the use of driving or sluicing dams in 214 Fed (2d) 336:

> "During the period of the log drives, dams such as those located at Bass Lake and Fish Trap Creek would be closed during the night and opened during the day. A preponderance of the evidence discloses that this was done for the purpose of flushing the logs down the river. However, there was testimony which the Commission was entitled to believe, to the effect that the dams were opened and closed for the most part to regulate the flow so that excessive water would not cause the moving logs to be scattered along the banks of the river, thus requiring man power to return them to the river water."

The only evidence in the record on the point indicates that the high water period which carried the flow of logs would pass any given point in 8 to 10 days.

On the basis of the foregoing the Court of Appeals stated: "We think the Commission under the authorities

cited is correct in holding that the east branch of the Chippewa River is navigable."

REASONS FOR GRANTING WRIT

I. The Decision is Contrary to a Decision of the Same Court in a Prior Case

In the case of *United States v. Chicago B. & Q. R. R. Co.*, (1937) 90 Fed. 2d 161, ceriorari denied 302 U. S. 714, 58 S. Ct. 33, 82 L ed. 551 the Circuit Court of Appeals for the Seventh Circuit affirmed a jury finding that the Chippewa River at its mouth, far downstream from the point now in question, was not a navigable water of the United States.

We confess that we were not able to find this case in time to call it to the attention of the lower court prior to its decision. We concede that the decision is neither *res adjudicata* against the United States nor entitled to the dignity of the rule of *stare decisis*, but respectfully suggest that it conclusively shows there is a critical issue presented which can only be resolved by this court.

II. This Case Has Decided an Important Question of Federal Law In a Way Which, to the Extent that It Has Been Passed Upon, is Probably in Conflict With the Decisions of This Court

The principal question presented by this case is whether the Federal Power Commission and the court below have not gone far beyond the definition of navigable waters

established by this court in the case of *United States v. Appalachian Electric Power Company,* (1940) 311 U. S. 377, 61 S. Ct. 291, 85 L ed. 243.

In this case a divided court by a 6 to 2 vote, Chief Justice Hughes not voting and Justices Roberts and McReynolds dissenting, held that the New River as it flows through Virginia and West Virginia, and in particular between the towns of Allisonia, Virginia, and into West Virginia, was a navigable water of the United Sta[illegible].

After dividing the section of the river in question into three segments and considering each segment separately, the court found that on the most difficult stretch of the river between Wiley's Falls and Radford it was possible to navigate with a boat with a draft of 2 to 2½ to 3 feet during the normal summer's low water.

Conventional navigation was clearly proved on the other two segments of the river.

This case represents the limit to which this court has gone in finding that a river which supported only a limited commerce was a navigable water of the United States.

In two previous cases which did not involve the power of the Federal Power Commission, this court has held that short periods of high water which will allow for the floating of loose logs or for intermittent navigation in small boats up to a period of as much as 40 days a year is insufficient to establish a water as a navigable water.

United States v. Rio Grande D. & I. Co., (1899) 174 U. S. 690, 19 S. Ct. 770, 43 L ed. 736;

Oklahoma v. Texas, (1922) 258 U. S. 574, 42 S. Ct. 406, 66 L ed. 771.

In the *Appalachian* case this court recognized that a determination of navigability was a determination of law, and refused to follow the conventional rule that factual findings concurred in by two lower courts should be accepted and reversed the ruling as a matter of law.

In the present case there is neither claim nor proof that the East Fork of the Chippewa River has been used or is usable in its present state or with reasonable improvements for any type of commercial navigation during the normal summer low water or for any other commerce than the driving of loose logs during the high water of spring.

If the rule of the *Appalachian* case should be extended to bring within the definition of navigable waters of the United States such little rivers as are involved in the present case, then it is highly important that such a ruling be embodied in a decision of this court both for the guidance of Congress in formulating future legislation and for the benefit of the state in advising them of the severe limitation upon their own powers.

III. The Decision of the Lower Court is Probably Not in Accord With the Review Requirements of the Federal Administrative Procedure Act

Under the provisions of Title 5 U. S. C. § 1009 (e), findings of an administrative agency must be supported by substantial evidence viewed in the light of the entire record.

In its opinion the lower court recognized that a preponderance of the evidence favored a finding that driving and sluicing dams were used for the purpose of flushing logs down the river. The court stated on the other hand that

there was evidence which the Commission was entitled to believe that the dams were used solely to hold back and regulate excessive water. This is not a determination that the finding was supported by substantial evidence in the light of the entire record.

> *Universal Camera Corporation v. N. L. R. B.*, (1951) 340 U. S. 474, 487, 71 S. Ct. 456, 95 L ed. 456;
>
> *N. L. R. B. v. Universal Camera Corporation*, on remand (1951), 190 Fed. 2d 429, 430.

CONCLUSION

The establishment of a line, if there be a line, between federal and state authority over navigable waters is of utmost importance and can be furthered by this case. For

this reason the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1953, APRIL SESSION, 1954

No. 10948

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent

On Petition for Review of an Order of the Federal Power Commission

July 2, 1954

Before Duffy, Lindley and Schnackenberg, Circuit Judges

DUFFY, *Circuit Judge.* This is a petition to review an order of the Federal Power Commission (hereinafter called Commission) issued April 21, 1953, amending a license for Project No. 2064 previously issued to Winter Electric Light and Power Company. The project is located at Snap Tail Rapids on the East Fork of the Chippewa River in Sawyer County, Wisconsin.

The jurisdictional basis for the original license for Project No. 2064 was that the project would occupy lands of the United States within the Chequamegon National Forest. In the license as issued there was a proviso that nothing therein should be construed as determining whether the East Fork of the Chippewa River is a navigable water of the United States at the project site or whether the interests of interstate commerce would be affected by the project if constructed.

In the application for an amendment, the licensee requested a finding by the Commission under § 4(e), 16 U. S. C. A., § 797, of the Federal Power Act, 16 U. S. C. A., § 791, *et seq.*, respecting the navigability of the East Fork of the Chippewa River and the effect of the project on the interests of interstate or foreign commerce.

In the order here under review the Commission found that the East Fork of the Chippewa River from points at

its headwaters upstream from the project site down to its mouth constitutes navigable water of the United States, and that the construction and operation of the project will affect the interests of interstate or foreign commerce. However, the State of Wisconsin and the Public Service Commission of Wisconsin contend that the East Fork of the Chippewa River is not navigable water of the United States, and they have petitioned for a review of the Commission's order.

The East Fork of the Chippewa River originates in the southeasterly part of Ashland County, Wisconsin, and flows in a southwesterly direction through Ashland and Sawyer Counties to its confluence with the West Fork of the Chippewa River, to form the Chippewa, which continues in a south-southwesterly direction until it empties at the south end of Lake Pepin, on the Wisconsin-Minnesota boundary, into the Mississippi River. The East Fork of the river has a number of rapids. At other places the river widens out and some of those wide areas are designated as lakes. Snap Tail Rapids is located between Blaisdell Lake and Hunter Lake and it is the site of the dam constructed by the Winter Electric Light and Power Company under Project No. 2064. The river water flows rapidly in Snap Tail Rapids and a number of rocks protrude above the water level, making the passage of any kind of boat very difficult. Since the construction of the dam most of the water in the river is diverted into an open canal, which extends for about 4/10 of a mile to the powerhouse, and the water is then returned to the river about one-half mile down stream from the dam by means of a tail race. The Department of the Army has never exercised active jurisdiction of the Chippewa River above Eau Claire, Wisconsin, which is many miles south of Snap Tail Rapids.

The East Branch of the Chippewa River never was utilized for ordinary boat traffic. The claim that it is navigable water under the federal test is based upon its use in log drives from 1876 to 1924, during that period when Wisconsin was denuded of its great pine forests. In the early days of the period, when railroad transportation was not available or convenient, a number of rivers in northern Wisconsin were utilized to move pine logs from the forests to the saw mills. Even in the latter part of that period,

and as long as the logs were available, some of the rivers were utilized for such purpose, apparently for economic reasons.

Log drives on the East Branch of the Chippewa occurred annually during the spring and early summer each year from 1876 to 1924. The practice was for lumber camps to be established at various points in the forest. In some old-time camps, the crews comprised as many as 100 men who, during the winter season, would cut as much as 20,000 feet of logs per day. These logs would then be dragged or otherwise transported to or near the edge of the river, waiting for high water resulting from the spring runoff. Some of the log driving operations were extensive, the record showing that one operator in 1895 cut and drove down river over 40,000,000 feet of pine from four camps. The record also shows that a single unit of a log drive would take from a week to ten days to pass a given point on the East Fork of the Chippewa. Many of the logs were driven to points outside of Wisconsin, such as Winona, Minnesota, and Dubuque, Iowa.

Special boats were used in connection with the log drives and were known as batteaux and wanigans. The batteaux were personnel carriers. A small type was 16 ft. long, but those most commonly used were about 30 ft. long and 4½ to 5 ft. wide, with a 10″ draft when loaded, and capable of carrying 18 men. The wanigans were large flat boats, 30 to 35 ft. long, formed of huge logs, sloped up at the ends, having one oar at the front end and one behind for guiding purposes. There were two types of wanigans, one known as a cook wanigan, to carry a shanty or tent, the cooks and the fireplace, and the other a blanket wanigan, for carrying blankets and other sleeping gear of the men engaged in the drive. Because of the rapid, shallow water at Snap Tail Rapids, together with the large boulders and stones in the river bed, it was customary to unload the wanigans and portage supplies around the rapids. Whether the wanigans were proceeding upstream carrying supplies for the logging camps or downstream accompanying the log drives, it was necessary to propel the wanigans through the rapids by the use of ropes and anchors. Many times, batteaux were brought through Snap Tail Rapids in the same manner. However, since 1924, when the log drives ended, there

had been no boat traffic through the rapids, except canoes or an occasional small fishing boat.

During the period of the log drives, dams such as those located at Bass Lake and Fish Trap Creek would be closed during the night and opened during the day. A preponderance of the evidence discloses that this was done for the purpose of flushing the logs down the river. However, there was testimony which the Commission was entitled to believe, to the effect that the dams were opened and closed for the most part to regulate the flow so that excessive water would not cause the moving logs to be scattered along the banks of the river, thus requiring manpower to return them to the river water.

Since Wisconsin's admission to the Union, its courts have applied the saw-log test of navigability. *Muench* v. *Public Service Comm.*, 261 Wis. 492, 55 N. W. 2d 40. Under the Wisconsin rule any stream in that State capable of floating a saw log during spring or other freshets is navigable. However, we must here determine whether the East Fork of the Chippewa is navigable under the federal rule, for a holding under State law is not determinative of navigability under federal law. *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 87.

The federal statutory definition of navigable waters is found in § 3(8) of the Federal Power Act, *16 U. S. C. A., § 791 (a), et seq.* Congress has classified navigable waters as being "parts of streams * * * which either in their natural or improved condition notwithstanding interruptions between the navigable parts * * * by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, * * *."

The decision of the Commission was based upon the premise that movement of loose logs and traffic by batteaux and wanigans constitute recognized methods of navigation and that the commerce resulting therefrom is commerce of a type contemplated in the commerce clause of the Constitution when shown to have interstate characteristics. The Commission considered that the logging operations from 1876 to 1924 constituted a business of large proportions, and that the log drives during that period were conducted regularly during the annual logging season.

The Commission relies on our opinion in *Wisconsin Public Service Corp* v. *Federal Power Comm.* (The Tomahawk Case), 147 F. 2d 743, certiorari denied 325 U. S. 880. In that case the principal commerce involved was logging, and dams were utilized to aid the drives. We there said, p. 747: "And it is well settled that the floating of logs, in the course of a continuous movement from one State to another, is interstate commerce and may be sufficient use for the purposes of commerce." (Citing) We also said, p. 748: "After applying the tests enumerated in the cases cited, we believe the evidence as shown by this record, establishes a long, regular and commercially successful use of the stream for the transportation of logs and rafts, and forms a reasonable basis in law for the conclusion that the Wisconsin River was and is a navigable water of the United States."

In *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners,* 168 U. S. 349, it was held that the upper reaches of the Mississippi River were navigable at all points, although it had been established that only logs were able to traverse certain sectors of the river. The court said, p. 359: "Preliminarily, it may be said that the Mississippi River at the point in question is a navigable stream. In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream. * * * It was navigable above the rapids for the purpose of running shallow boats and for floating logs." Hence the situation was similar to the proof in the case at bar, which established that the river both above and below Snap Tail Rapids had been used for the transportation of logs and the running of shallow boats. Both sides cite *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377. It is noteworthy that the court there said, p. 405: "It is obvious that the uses to which streams may be put vary from the carriage of ocean liners to the floating out of logs; * * *."

The fact that the East Branch of the Chippewa River has not been used for the transportation of logs since 1924 is, according to the authorities, of little moment. In *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, it appeared that the Desplaines River in Illinois had been used by canoes and light draft boats from 1675 to 1825.

For 100 years thereafter it had not been used for navigation. The Supreme Court stated, p. 124: "The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through * * * changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; * * *."

We think the Commission under the authorities cited is correct in holding that the East Branch of the Chippewa River is navigable. It should be noted, however, that any issue as to the recreational value of the river is not before us. This question was determined by the Commission prior to the issuance of the original license. Order

Affirmed.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Friday, July 2, 1954.

Before Hon. F. Ryan Duffy, Circuit Judge; Hon. Walter C. Lindley, Circuit Judge; Elmer J. Schnackenberg, Circuit Judge.

No. 10948

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent

On Petition for Review of an Order of the Federal Power Commission

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Power Commission issued in this cause on April 21, 1953, be, and the same is hereby, Affirmed.

Clerk's Certificate to foregoing transcript omitted in printing.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 373

THE STATE OF WISCONSIN AND THE PUBLIC SERVICE COMMISSION OF WISCONSIN, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 12-17) is reported at 214 F. 2d 334. The opinion and order of the Federal Power Commission is set out at R. 116-132.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1954 (Pet. App. 17-18). The petition for a writ of certiorari was filed on September 28, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Power Commission, which licensed the construction and operation of a hydroelectric project at Snap Tail Rapids on the East Fork of the Chippewa River in Wisconsin, correctly determined that the East Fork, up to and past Snap Tail Rapids, constituted "navigable waters" within the meaning of Section 3(8) of the Federal Power Act.

STATUTE INVOLVED

The Federal Power Act (41 Stat. 1063, as amended by 49 Stat. 838, 16 U.S.C. 791a *et seq.*) provides in pertinent part:

> Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwith-

standing interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

* * * *

STATEMENT

Proceedings. In November, 1951, the Federal Power Commission issued a license to Winter Electric Light and Power Company to construct and operate a hydroelectric project at Snap Tail Rapids on the East Fork of the Chippewa River in Sawyer County, Wisconsin. (R. 7-8.) 10 F.P.C. 1530. The jurisdictional basis for this license was that the project would occupy lands of the United States within the Chequamegon National Forest. 10 F.P.C. at 1532; R. 7, 123-124. The license, as issued, contained a proviso that nothing therein should be construed as determining whether the East Fork is a navigable water of the United States at the project site or whether the interests of interstate commerce will be affected by the project if constructed. 10 F.P.C. 1532; R. 124.

Thereafter, the Wisconsin Supreme Court held that the federal license was not exclusive and that a State permit as well was necessary, resting its decision on a determination that one-half of the proposed dam would be located outside the National Forest. *Luening* v. *Public Service Commission*, 261 Wis. 516; see R. 20-24, 125. The Company thereupon requested the Commission to make a finding as to the navigability of the East Fork (R. 17-19). It also requested, as a basis for exercising the right of eminent domain, a finding under Section 21 of the Act that the project was in aid of navigation and for the benefit of interstate commerce (R. 18-19). After further hearings, the Commission, by order issued April 21, 1953 (R. 123-132), found that the East Fork from points in its headwaters upstream from the project site down to its mouth constitutes navigable waters of the United States (R. 128). It accordingly directed that the license be amended to include a jurisdictional finding that the East Fork constituted a navigable water.

Petitioners herein, having intervened before the Commission, applied for rehearing as provided in Section 313(a) of the Power Act (R. 132-134). Upon its denial, they petitioned the court below for review under Section 313(b) of the Act (R. 135-142). The court of appeals affirmed, holding that the Commission was correct in its determination that the East Fork constituted navigable waters (Pet. App. p. 17).

Facts Relating to Navigability. The facts perti-

nent to the issue of navigability of the East Fork are as follows: The East Fork originates northeast of the Village of Glidden in the southeastern part of Ashland County, Wisconsin, and runs in a southwesterly direction through Ashland and Sawyer Counties to its confluence with the West Fork of the Chippewa River (R. 117, 126). The Chippewa River then continues south and southwesterly through a number of counties, passing through the cities of Chippewa Falls and Eau Claire, Wisconsin, and empties into the Mississippi River at the south end of Lake Pepin on the Wisconsin-Minnesota boundary (R. 117, 126). The East Fork has several rapids and at some places it widens out, the wide areas being designated as lakes. The river water flows rapidly in Snap Tail Rapids and a number of rocks protrude above the water level, making the passage of any kind of boat very difficult (R. 82, 106, 113). At the project site, the East Fork is about 110 feet wide; it is 2½ feet deep normally and 5-6 feet deep during the spring season (R. 51, 114-115).

The East Fork was used principally for log driving by a number of lumber companies engaged in the harvesting of timber in the Chippewa-Flambeau watershed (R. 117). The drives occurred annually from 1876 to about 1924, apparently terminating in the latter year because the stands of virgin timber became so depleted as to make further operations financially unattractive (R. 117, 127). The drives went down the river past the project site at Snap Tail Rapids to points

downstream therefrom, with many of the logs being driven to points outside of Wisconsin, such as Winona and Wabasha, Minnesota, and Dubuque and Davenport, Iowa (R. 127). Some logs were delivered to places such as Ojibwa, Wisconsin, where they were sawed up and shipped to places outside of Wisconsin (R. 127). The present use of the river is for power development, recreational fishing and pleasure boating (R. 117).

Logging constituted a big business in which many loggers took part; crews of old-time camps consisted of about 100 men and sawing teams cut about 20,000 feet of logs per day (Pet. App. 14). The drives, which involved the movement of logs as large as three or four feet in diameter, began in the spring of each year following the spring thaw (R. 31, 55, 59, 117). The normal snowfalls in the headwaters of the East Fork are heavy, so that ordinarily there was sufficient water during the spring to float logs from the headwaters down through Snap Tail Rapids. Sometimes, when the stream flow was low, it was necessary to release water at Bear Lake, Fishtrap Creek and Blaisdell driving dams to raise the stage of the river in the rapids section, thus accelerating the movement of loose logs downstream through the Snap Tail Rapids and into the main channel of the Chippewa River (R. 128). The dams were also used to control the number of logs passing out of the lakes. It took each log drive some 8 or 10 days to pass a point such as Snap Tail Rapids; the movement

of a log from the headwaters to the junction of the East and West Forks took about two months (R. 30-34, 40-42, 43-44, 46-49, 79, 101, 128).

Boats—called bateaux and wanigans—were used in connection with the drives. The bateaux, used for work purposes, were about 30 feet long and 4½ feet to 5 feet wide, carried 18 men and their gear, and drew about 10 inches of water when fully loaded and about half that draught when unloaded (R. 117, 127). The wanigans were large flat boats, 30 to 35 feet long, and were used either as "cook" or "blanket" wanigans (R. 117, 127). The former accommodated a shanty or tent, the cooks, and a fireplace, and provided eating space for the men; the latter provided sleeping space and carried sleeping equipment. When these boats carried supplies either upstream or downstream, the supplies were portaged around Snap Tail Rapids, a distance of approximately one-half mile, while the boats themselves were propelled through the Rapids by the use of ropes or anchors (R. 55, 57, 63, 127).

On the basis of these facts, the Commission concluded that the East Fork, from points in its headwaters upstream from the project site (Snap Tail Rapids) down to its mouth, constitutes navigable waters of the United States, and that construction and operation of the project will affect the interests of interstate or foreign commerce (R. 128).

ARGUMENT

1. The court below was clearly correct in affirming the Commission's finding that the East Fork of the Chippewa River constitutes "navigable waters." The record plainly reveals that the river had been used for annual log drives for an extended period of time, *i.e.*, from 1876 until 1924, when further logging in the watershed became unprofitable. See *supra*, pp. 5-7.

As this Court has repeatedly held, "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *The Montello*, 20 Wall. 430, 441. It is the "capability of use by the public for purposes of transportation and commerce [which] affords the true criterion of the navigability of a river * * *." *Ibid.* See *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U.S. 349, 359; *Pound* v. *Turck*, 95 U.S. 459, 464; *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 159-160; cf. *Champlain Realty Co.* v. *Brattleboro*, 260 U.S. 366; *Hughes Bros. Co.* v. *Minnesota*, 272 U.S. 469. Commenting on the principle enunciated in this line of cases, this Court stated in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 405, that "It is obvious that the uses to which streams may be put vary from the carriage of ocean liners to the floating out of logs * * *." Far from extending the *Appalachian* case (see Pet. pp. 8-9), which actually involved "sporadic trans-

portation" (311 U.S. at 415), the holding below falls squarely within settled principles fully accepted by that decision.[1]

Petitioners allege an intra-circuit conflict (which they concede that they did not call to the attention of the court of appeals (Pet., p. 7)) on the ground that the Seventh Circuit, in 1937, sustained a jury finding, made in a condemnation case, that the Chippewa River was non-navigable. *United States* v. *Chicago B. & Q. R.R. Co.*, 90 F. 2d 161, certiorari denied, 302 U.S. 714. It does not appear, however, on what evidence the jury determination was based, nor how extensive a record was made with reference to the navigability point, which was one of many issues involved in the litigation. In the circumstances, one can scarcely regard the court's affirmance of the determination of an expert agency, made on a full record in a special proceeding to determine the question of naviga-

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[1] Petitioners refer to *United States* v. *Rio Grande D. & I. Co.*, 174 U.S. 690, and *Oklahoma* v. *Texas*, 258 U.S. 574, as authority for the proposition that the flotation of logs for short periods of high water and the intermittent navigation of small craft is insufficient to establish a stream as a navigable water (Pet., p. 8). In the *Rio Grande* case, the evidence revealed only two shipments of merchandise and these for a maximum distance of twelve miles. In this connection, the Court observed, by way of dictum, that a natural capacity for occasional flotation of logs will not establish navigability. In the *Oklahoma* case, there was no evidence of navigability at all.

It may also be noted that under Wisconsin's own decisions, which apply the so-called "saw-log" test, there could be no doubt of the navigability of the East Fork. See *Muench* v. *Public Service Commission*, 261 Wis. 492.

bility, as creating an intra-circuit conflict of any substance.

The Seventh Circuit did, however, expressly consider the effect of logging operations on the question of navigability in *Wisconsin Public Service Corporation* v. *Federal Power Commission,* 147 F. 2d 743, a case virtually identical on its facts to the instant case, although relating to the Wisconsin River. There, as here, the principal use of the portion of the river involved was for log drives, which were dependent upon seasonal flows of water. It appeared in that case that dams were utilized to aid the drives, and that the use of the river for logging ceased with the advent of railroads in the early part of this century. The Wisconsin Public Service Corporation made the same arguments as are advanced by petitioners here. The court of appeals, reviewing the holdings of this Court, rejected these contentions, stating (147 F. 2d at 747-748):

> * * * And it is well settled that the floating of logs, in the course of a continuous movement from one State to another, is interstate commerce, and may be a sufficient use for the purposes of commerce.
>
> * * * * *
>
> * * * After applying the tests enumerated in the cases cited, we believe the evidence as shown by this record, establishes a long, regular, and commercially successful use of the stream for the transportation of logs and rafts,

> and forms a reasonable basis in law for the conclusion that the Wisconsin River was and is a navigable water of the United States.

This court denied certiorari, 325 U.S. 880.

The governing principle of law is firmly established and its application to the facts at bar is plainly correct.

2. As indicated in the Statement (see *supra,* pp. 4-7), the Commission's findings are amply supported by the record. Petitioners' claim to the contrary is limited to a single matter—the agency's findings as to the purposes for which the driving and sluicing dams were used (Pet., pp. 9-10). Petitioners urged that the impoundment and release of water at these dams was an indispensable factor in the movement of the logs and that the flushing effect was necessary to move the logs (R. 118). On the other hand, the Company contended that the dams were used, for the most part, to hold back and regulate excessive water so that the logs would not be scattered along the banks of the river. The Commission, however, ruled that "resolution of this controversy is not necessary to the determination of this matter, for * * * under either assumption, the dams constituted 'improvements' to navigation" (R. 118). And as the Commission further stated (R. 120; see also R. 128):

> * * * The record suggests, however, that sometimes, in the event of lower than normal

> spring run-off, releases were made of water impounded at Bear Lake, Fishtrap Creek, and Blaisdell regulating dams, which are located at points above the rapids section, which releases would raise the stage of the river in the critical or rapids section, thus accelerating the movement of loose logs downstream through the rapids and into the main channel of the Chippewa below the junction of the East and West Forks. However, the principal use of the Blaisdell and Fishtrap dams appears to have been to regulate the flow of water in order that logs would not be floated out over the banks in the narrower sections, and to provide a control point for the logs so that they would be released through the rapids sections in a manner which would lessen the chances of jams. Whether used to decrease high flows or to augment low flows, the dams constituted improvements to navigation.

In view of the Commission's holding, which petitioners do not attack, that under either view of the dams' purposes the dams constituted improvements to navigation, there plainly is no substance to the contention that the court below acted contrary to Section 10(e) of the Administrative Procedure Act and committed prejudicial error when it held that there was evidence in the record supporting both views as to the dams' uses (Pet. App., p. 15).

CONCLUSION

The decision below is clearly correct and in accord with long-established principles. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 319767 967